

**IN THE COURT OF APPEALS OF THE STATE OF TENNESSEE
EASTERN SECTION AT KNOXVILLE**

| | | |
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| STATE OF TENNESSEE, ex rel. |) | |
| ROBERT E. COOPER, JR., in his official |) | |
| capacity as the Attorney General And Reporter |) | |
| of Tennessee and JAMES H. FYKE, |) | |
| Commissioner of the Tennessee Department of |) | |
| Environment and Conservation, |) | |
| |) | |
| Plaintiffs-Appellants, |) | |
| |) | |
| v. |) | No. E2007-02424-COA-R3-CV |
| |) | Hamilton County Chancery |
| LAHIERE-HILL, LLC, |) | |
| |) | |
| Defendant-Appellee. |) | |

REPLY BRIEF OF STATE APPELLANTS

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

| | Page |
|--|-------------|
| TABLE OF AUTHORITIES | ii |
| ARGUMENT | 1 |
| I. LAHIERE’S PREOCCUPATION WITH FACTS IS MISPLACED, BECAUSE THE TRIAL COURT’S INTERPRETATION OF THE 1951 MINERAL RESERVATION PRESENTS A QUESTION OF LAW AND NO PRESUMPTION OF CORRECTNESS ATTACHES THERETO. | 1 |
| II. THE STATE’S ACTION FOR DECLARATORY JUDGMENT, TRESPASS, EJECTMENT AND ABATEMENT OF A PUBLIC NUISANCE CANNOT BE CHARACTERIZED AS AN EXERCISE OF EMINENT DOMAIN OR AN UNCOMPENSATED TAKING. ... | 5 |
| III. THE REASONABLENESS OF LAHIERE’S STONE REMOVAL ACTIVITIES IS A QUESTION OF FACT THAT DEFENDANT NEVER ADDRESSED ON SUMMARY JUDGMENT, THEREFORE, THE STATE’S BURDEN TO PRODUCE EVIDENCE ON THIS PUBLIC NUISANCE ISSUE WAS NEVER TRIGGERED. | 9 |
| CONCLUSION | 11 |
| CERTIFICATE OF SERVICE | 12 |
| APPENDIX | 13 |

TABLE OF AUTHORITIES

CASES

Page

| | |
|--|-------|
| <i>Acker v. Guinn</i> , 464 S.W.2d 348 (Tex. 1971) | 5 |
| <i>Beury v. Shelton</i> , 151 Va. 28, 144 S.E. 629 (1928) | 3 |
| <i>Blair v. West Town Mall</i> , 130 S.W.3d 761 (Tenn. 2004) | 9, 10 |
| <i>Brown v. Crozer Coal & Land Co.</i> , 144 W.Va. 296, 107 S.E.2d 777 (1959) | 5 |
| <i>Campbell v. Tennessee Coal, Iron & R. Co.</i> , 265 S.W. 674 (Tenn. 1924) | 4 |
| <i>Deer Lake Co. v. Michigan Land & Iron Co.</i> , 89 Mich 180, 50 N.W. 807 (1891) | 3 |
| <i>Doochin v. Rackley</i> , 610 S.W.2d 715 (1981) | 4, 5 |
| <i>Hannan v. Alltel Publishing Co.</i> , 27 WL 208430 (Tenn. Ct. App. January 26, 2007) | 10 |
| <i>Sadler v. State</i> , 56 S.W.3d 508 (Tenn. Ct. App.), <i>appeal denied</i> , (2001) | 9 |
| <i>State ex rel. Crist v. Bomar</i> , 365 S.W.2d 295 (Tenn. 1963) | 8 |
| <i>State v. Howard</i> , 2 S.W.3d 245 (Tenn. Crim. App. 1999) | 8 |

STATUTES

| | |
|--|---|
| Tenn. Code Ann. § 9-8-307(a)(1)(V) | 7 |
|--|---|

ARGUMENT

I. LAHIERE’S PREOCCUPATION WITH FACTS IS MISPLACED, BECAUSE THE TRIAL COURT’S INTERPRETATION OF THE 1951 MINERAL RESERVATION PRESENTS A QUESTION OF LAW AND NO PRESUMPTION OF CORRECTNESS ATTACHES THERETO.

As an initial matter, Lahiere contends that it “has for years mined sandstone dimension stone,” and that it was mining this stone before the State’s purchase of surface rights from Bowater between 2000 and 2004, “without objection or complaint from Bowater.” *See* Appellee’s Brief, p. 5. But Lahiere offers no evidentiary citations for these bald assertions of fact, which are made in its “Statement of the Case.” The one citation to the record Lahiere does offer is to the Trial Court’s Memorandum Opinion and Order of August 17, 2007, but even that opinion simply references Lahiere’s contract with Danny Hendon to mine stone, which was entered into in 2002. (Ex. 12). Mr. Hill, himself, testified that he actually began mining the dimension stone in the region in 2003. (Vol. V, p. 59). In other words, Lahiere’s mining of sandstone/dimension stone in the Hamilton County area only began in 2003, and any suggestion that either it or its predecessors in title were mining stone well before that period is without basis in fact.

Lahiere also erroneously asserts that the State denied only two of its fourteen statements of undisputed material facts in support of its motion for summary judgment. *See* Appellee’s Brief, pp. 10, 15, 19. The State actually denied six of Lahiere’s statements of fact and legal conclusions. A close examination of the State’s response in opposition to defendant’s motion for summary judgment reveals that the State denied the assertions contained in paragraphs, 7, 8, and 11-14 of the statement of undisputed facts. (Vol. III, pp. 424-430). The State emphatically denied the assertions in paragraphs 11-14, which can be characterized as nothing less than conclusions of law regarding Lahiere’s “rights” as a mineral owner. (Vol. III, pp. 424-430). Furthermore, the State took pains to

deny, in paragraphs 8 and 10 of the statement of undisputed facts, that sandstone/dimension stone is a mineral within the meaning of the mineral reservation in the 1951 deed. (Vol. III, pp. 427-428). And that is the threshold question in this matter.

Despite Lahiere's preoccupation with its statement of undisputed facts, the Trial Court itself recognized that the question of whether sandstone is a mineral within the scope of the 1951 deed "is a question of law for the court to decide, rather than a factual question." (Vol. IV, p. 514). What the Trial Court failed to do, contrary to Lahiere's assertion, was to adhere to the proper legal standard in its construction of the mineral reservation. Rather than reading the language of the instrument in light of surrounding circumstances to ascertain the *original* parties' intentions, the Trial Court resorted to contemporary sources and bluntly concluded that the language of the deed, which simply referenced "mines" and "minerals," was unambiguous.

Just as the Trial Court did (Vol. IV, p. 515), Lahiere relies upon current dictionary definitions to buttress its assertion that the deed's reference to mines and minerals must have contemplated sandstone and dimension stone, because that comports with a "plain, ordinary" reading of the deed's language. *See* Appellee's Brief, pp. 20-21. But these strict etymological interpretations, particularly the definition of "mineral," are scientific in detail, something the Trial Court later discounted when it considered the affidavit of the State's geologist, Dr. Peter J. Lemiszki. (Vol. IV, p. 519).¹ And being contemporary, these definitions necessarily embrace more modern concepts that cannot be said to have been part of the "plain, ordinary meaning" in 1951. Both

¹The affidavit of Peter J. Lemiszki (Vol. III, pp. 437-440) was offered by the State in response to Lahiere's motion for summary judgment only to counter the testimony of Lahiere's own geologist, Linda Main, who testified at the hearing on the State's motion for temporary injunction on March 21, 2007. (Vol. V, pp. 94-105). Dr. Lemiszki was not present at the hearing on March 21, 2007 and Lahiere offered no affidavits or additional proof in support of its Motion for Summary Judgment, other than the testimony from that hearing.

Lahiere and the Trial Court hew to a more modern interpretation of the terms in the mineral reservation. This is an error of law, and there are no facts to support such a construction.

Lahiere also continues to rely primarily on authorities from North Carolina and to disavow Tennessee Supreme Court cases, as well as the authorities from multiple jurisdictions cited in the State's opening brief. Lahiere does cite one old Tennessee Supreme Court case, *Murray v. Allard*, 100 Tenn. 100, 43 S.W. 355 (1897), but in *Murray*, the Court quoted with approval the following definition of "mine:"

A mine is a work for the excavation of minerals by means of pits, shafts, levels, tunnels, etc., as opposed to a quarry where the whole excavation is open.

Id. at 358. Thus, the Court adopted a more traditional definition of a mine that did not include quarrying or any type of surface extraction. Other states have reached a similar conclusion. In *Beury v. Shelton*, 151 Va. 28, 144 S.E. 629, 631 (1928), the Virginia Supreme Court held that a reservation of "all the metals and minerals of every kind and character whatsoever in and underlying the entire body of said two tracts" did not include limestone. The court noted that while limestone is a mineral "in the scientific or geological sense," the word "mines" generally "imports a cavern or subterraneous place, containing metals or minerals, and not a quarry; and mineral means ordinarily metallic fossil bodies, and not limestone." *Id.* at 632.

In *Deer Lake Co. v. Michigan Land & Iron Co.*, 89 Mich. 180, 50 N.W. 807, 809 (1891), the Michigan Supreme Court held that a deed reserving all "mines and ores or metal" did not encompass marble or serpentine deposits, because, at the time of the deed was drawn, the only valuable mineral found in that section of the country was iron. The court concluded that the parties could not have

intended to include marble or serpentine deposits that were discovered at a later time. *Id.*

Although the Court in *Murray* engaged in a rather lengthy exegesis of the terms “mine” and “mineral,” or at least adopted the intermediate appellate court’s critique of those terms, it also focused on the intentions of the original parties to the deed and the surrounding circumstances, something Lahiere overlooks. 43 S.W. at 356. In subsequent years, the Tennessee Supreme Court consistently adhered to this latter analytical formula for these types of disputes. *Doochin v. Rackley*, 610 S.W.2d 715, 719 (Tenn. 1981); *Campbell v. Tennessee Coal, Iron & R. Co.*, 265 S.W. 674, 676 (Tenn. 1924).

Lahiere attempts to distinguish the cases cited in the State’s opening brief by insisting “[n]one address the limited scope of surface mining involved in this case.” *See* Appellee’s Brief, p. 24. Yet Lahiere’s own contractor admitted “[y]ou can’t tell what’s there until you start digging. After you start digging into it, then you can get down under it and see what’s in the dirt and under the vegetation.” (Vol. V, 77). He conceded that the stones he desired to access were often covered with topsoil, vegetation, and trees. (Vol. V, 78). While Lahiere may not be digging an individual pit or quarry in the Cumberland Trail State Park (CTSP), the fact remains that it is excavating a broad swath of land over several hundred acres and the impact of its activities in and around the CTSP is not insubstantial. The photographic and digital video evidence offered by the State during the hearing on the State’s motion for temporary injunction (Exs. 2 and 3) confirms this. *See also*, Supplemental Technical Record, filed April 2, 2008 (color photographs).² Furthermore, the cases cited by the State involved numerous forms of surface extraction, not simply quarrying. *See, e.g.*,

²The State moved to supplement the appellate record in this matter, after discovering that photographic evidence submitted in the Trial Court in color had actually been transmitted to the Court of Appeals in black and white, since the Trial Court was not in possession of a color copier.

Doochin v. Rackley, 610 S.W.2d 715 (Tenn. 1981) (strip mining of coal); *Acker v. Guinn*, 464 S.W.2d 348, 350 (Tex. 1971) (strip mining iron ore); *Brown v. Crozer Coal & Land Co.*, 144 W. Va. 296, 107 S.E.2d 777 (1959) (auger mining of coal).

In sum, it is abundantly clear that Tennessee and the majority of jurisdictions interpret mineral reservations very narrowly, generally holding that stone is not included in a reservation absent very specific language or incontrovertible evidence that the parties intended to reserve it. The Trial Court's grant of summary judgment to Lahiere on this issue, therefore, constitutes reversible error.

II. THE STATE'S ACTION FOR DECLARATORY JUDGMENT, TRESPASS, EJECTMENT AND ABATEMENT OF A PUBLIC NUISANCE CANNOT BE CHARACTERIZED AS AN EXERCISE OF EMINENT DOMAIN OR AN UNCOMPENSATED TAKING.

As it did in the Trial Court, Lahiere continues to rivet its attention on the State's inquiries regarding the purchase of a portion of defendant's mineral rights in the North Chickamauga Creek Gorge area of Hamilton County. *See* Appellee's Brief, pp. 6, 11, 31-32. What Lahiere fails to mention is that this parcel was not part of the CTSP and formed no portion of the land that is the subject of this lawsuit. Ranger Andrew Wright testified that he had observed Lahiere's contractor operating in the spring of 2006 "on an area that's off the park within North Chickamauga." (Vol. V, p. 43; Ex. 1). Still, Lahiere takes convenient aim at the State's interest in this particular parcel of mineral rights in order to invent a takings claim.

Reggie Reeves, Director of Natural Heritage in the Tennessee Department of Environment and Conservation, corresponded with Elmer Hill of Lahiere-Hill Properties in 2004 in an effort to

discuss the possible acquisition of Lahiere's mineral interests in the North Chickamauga Creek Pocket Wilderness Area. (Ex. 7). Mr. Reeves, who is *not* the Director of State Parks,³ but the Director of Natural Heritage, as the footer in his letter indicates, explained:

It is our hope to bring together under a single ownership both the surface rights and mineral interest of the spectacular North Chickamauga Creek Gorge, to manage it as a *state nature preserve*, and to forever protected [sic] from development for all Tennesseans.

(Ex. 7) (emphasis supplied). Correspondence between Mr. Reeves and Mr. Hill was offered into evidence by Lahiere during the March 21, 2007, temporary injunction hearing, but Mr. Reeves was not present at the hearing. Mr. Hill was present and offered testimony regarding his oral exchanges with Mr. Reeves about this potential acquisition of Lahiere's mineral interests in the North Chickamauga area, but counsel for the State raised repeated objections to hearsay and relevance. (Vol. V, pp. 66-68). The Trial Court actually sustained the hearsay objections (Vol. V, p. 69) and agreed that the line of questioning was probably not relevant:

MS. McCARTER: Your Honor, the property we're talking about isn't even on this map. [Ex. 1]. It's not part of the trail. So why does this have anything to do with what we're here for today?

THE COURT: I personally wouldn't think it would be if it doesn't cover any of the property we're here discussing today.

(Vol. V, p. 68). Although the Trial Court permitted Lahiere's counsel the opportunity to make an offer of proof on this issue after the court adjourned (Vol. V, p. 69), Lahiere never availed itself of

³ Lahiere continues to labor under the misapprehension that Reggie Reeves has administrative responsibility over all State parks, while that authority actually falls to Mike Carlton, the Assistant Commissioner for State Park Operations, who also verified the State's Complaint in this matter. (Vol. I, pp. 23-24).

that opportunity. Nonetheless, the Trial Court repeatedly, and erroneously, made reference to the State's inquiries and alleged purchase offer in its Memorandum Opinions. (Vol. IV, pp. 507-508, 571).

The argument that the State is attempting to take or "seize" Lahiere's property rights without compensation, as opposed to purchasing them is, therefore, a specious one.⁴ The State filed this action, along with a motion seeking temporary injunctive relief on February 22, 2007, shortly after learning of the damage to the CTSP in mid January of that year. (Vol. I, pp. 8-22; Vol. III, pp. 307-317). And contrary to Lahiere's assertion, defendant's contractor did not call State officials "to inform them of the accident and asked for guidance." See Appellee's Brief, p. 14.⁵ Rather, park officials learned of the damage in January 2007 from private citizens, who reported that stone harvesting activities had disturbed a portion of the Cumberland Trail. (Ex. 2, ¶ 5).

Lahiere's reliance on cases imposing a strict construction on the power of eminent domain is unfounded, *see* Appellee's Brief, pp. 32-34, because those cases have no application to the facts or issues herein, as argued above. While it may be true that under Tennessee law, the courts have strictly construed the power of eminent domain against the condemner, the analogy is baseless. The State had every right to institute an action, once the extensive damage to the Trail was discovered and Lahiere rejected the State's offer to reach an accommodation. (Exs. 10, 11).

Moreover, the State always intended to file this suit as a declaratory judgment action to have the rights of the parties declared by the Trial Court, in addition to an action for ejectment, trespass,

⁴ It should also be noted that the courts in Tennessee have no jurisdiction to entertain such a claim against the State, since exclusive jurisdiction for such takings claims lies in the Tennessee Claims Commission. Tenn. Code Ann. § 9-8-307(a)(1)(V).

⁵ Again, Lahiere offers no citation in the record to support this statement and the State can find none.

and abatement of a public nuisance. But without knowing the actual identity and addresses of each and every individual who has an ownership interest in the mineral estate at issue herein, the State elected, initially, to file the complaint as an ejectment, trespass, and nuisance action, and to serve interrogatories simultaneously to discover the identity of all mineral owners. Once Lahiere provided the State with assurances regarding the specific ownership of the mineral interests in its court filing in opposition to the State's Motion for Temporary Injunction,⁶ the State promptly amended its complaint on March 21, 2007, to add an action for declaratory judgment under Tenn. Code Ann. §§ 29-14-102 and -103 to determine the rights of the surface owners and mineral owners in the same real property. (Vol. III, 322-324).

Lahiere's focus on both the State's pursuit of the mineral interests in the North Chickamauga Creek Gorge and the notices of coverage under the general storm water permit issued by the State to defendant's contractor, Marty Daggett, is essentially a veiled attempt at an estoppel or laches defense. But Lahiere knows only too well that very exceptional circumstances are required to invoke estoppel against the State. *State v. Howard*, 2 S.W.3d 245, 247 (Tenn. Crim. App. 1999). The courts have consistently held that public policy forbids application of the doctrine to the State either due to the negligence of public officers, or to their conduct and representations. *State ex rel. Crist v. Bomar*, 365 S.W.2d 295, 297-298 (Tenn. 1963). Lahiere formally raised the defenses of estoppel and laches in its pleading (Vol. III, p. 358), and the Trial Court made more than a passing reference to them in its Memorandum Opinions, (Vol. III, pp. 345-347; Vol. IV, pp. 507-508), but reliance on these doctrines is a clear error of law in the instant case.

⁶ Lahiere provided a statement regarding the ownership of mineral interests in its brief in opposition to the Motion for Temporary Injunction filed March 19, 2007. Since this was a legal brief, it is not included in the appellate record.

III. THE REASONABLENESS OF LAHIERE'S STONE REMOVAL ACTIVITIES IS A QUESTION OF FACT THAT DEFENDANT NEVER ADDRESSED ON SUMMARY JUDGMENT, THEREFORE, THE STATE'S BURDEN TO PRODUCE EVIDENCE ON THIS PUBLIC NUISANCE ISSUE WAS NEVER TRIGGERED.

It is axiomatic that “the key element of any nuisance is the reasonableness of the defendant’s conduct under the circumstances.” *Sadler v. State* 56 S.W.3d 508, 511 (Tenn. Ct. App.), *appeal denied*, (2001). As argued in the State’s opening brief, there was ample evidence produced by the State during the hearing on the State’s motion for temporary injunction in March 2007 to support its public nuisance claim and the unreasonableness of defendant’s activities. Lahiere failed to negate this basis for the State’s action, other than by offering, through its contractor, to restore the portion of the Cumberland Trail it had already damaged and to meet with State officials, all *future* activities. (Vol. V, p. 91). In its motion for summary judgment, however, Lahiere never addressed the public nuisance claim that the State had advanced or the reasonableness of its extraction methods, electing instead to focus its efforts on the scope of the mineral reservation, and relying only on proof adduced at the temporary injunction hearing. (Vol. III, pp. 370-418).

In order to properly support a motion for summary judgment, the moving party:

must either affirmatively negate an element of the non-moving party’s claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for suit, the non-moving party’s burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail.

Blair v. West Town Mall, 130 S.W.3d 761, 767 (Tenn. 2004). In *Blair*, the Court addressed the burden-shifting framework that applies on summary judgment in a premises liability action in which the plaintiff had alleged, *inter alia*, that the defendant mall owner had notice of the presence of a

dangerous condition before plaintiff's accident. The mall owner moved for summary judgment arguing that the plaintiff had no evidence to show that defendant had actual or constructive notice of the alleged dangerous condition. Although the trial court granted the mall's motion for summary judgment, the Tennessee Supreme Court held, on appeal, that the mall owner had failed to affirmatively negate the element of notice, stating:

In support of Defendant's motion for summary judgment, Defendant offered Plaintiff's deposition testimony that Plaintiff does not know how long the substance had been present on the parking lot or whether Defendant had notice of its presence. The Court of Appeals was correct in noting that while this evidence casts doubt on Plaintiff's ability to prove at trial whether Defendant had actual or constructive notice of the dangerous condition in Defendant's parking lot, it does not negate the element of notice. The deposition testimony does not prove that the Defendant did not have actual or constructive notice.

Id. at 768. *See also, Hannan v. Alltel Publishing Co.*, No. E2006-01353-COA-R3-CV, 2007 WL 208430 (Tenn. Ct. App. January 26, 2007), *appeal granted*, June 18, 2007 ("Material supporting a motion for summary judgment must do more than 'nip at the heels' of an essential element of a cause of action; it must negate that element.") (Copy attached).

Similarly, Lahiere offered no evidence in support of its summary judgment motion to negate the State's public nuisance claim by proving the reasonableness of its surface mining methodology. Lahiere relied only on the language in the 1951 mineral reservation, mistakenly assuming that all of the State's causes of action could be addressed as questions of law. The Trial Court committed the same error.

In the event this Court concludes that the 1951 mineral reservation does encompass stone and surface mining, the decisions above demonstrate that it was clearly improper for the Trial Court to

have granted Lahiere's motion for summary judgment as a matter of law on the State's public nuisance claim.

CONCLUSION

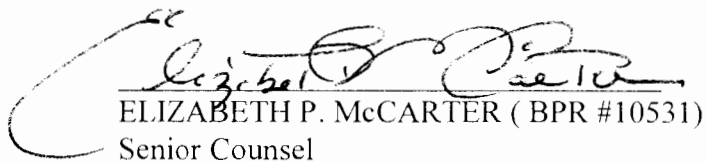
For all the foregoing reasons, this Court should reverse the final judgment entered by the Trial Court that the 1951 mineral reservation encompasses sandstone and any form of surface mining.

Alternatively, this Court should reverse the Trial Court's award of summary judgment on the State's public nuisance claim, restore the temporary injunction Order of April 4, 2007, and remand this case to the Trial Court for trial on that claim.

Respectfully submitted,

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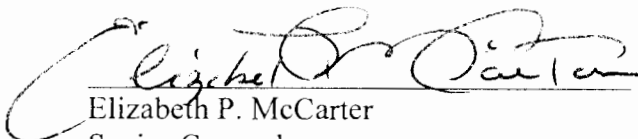


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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Reply Brief of Appellants has been served upon the following via first Class U.S. Mail, postage prepaid, on this 22nd day of April, 2008:

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